



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KERICHO**

**CIVIL SUIT NO.7 OF 2006**

**ALICE CHEPKETER SOI.....PLAINTIFF**

**VERSUS**

**JULIUS MAINA THUO.....1ST DEFENDANT**

**PAUL NGANGA.....2ND DEFENDANT**

**STEPHEN WANYEKI KURIA.....3RD DEFENDANT**

**R U L I N G**

1. This is the Notice of Motion dated 4th November, 2014 brought under **Sections 1A and 3A** of the **Civil Procedure Act Cap 21** of the **Laws of Kenya, Order 10 Rule 11, Order 50 Rule 1** of the **Civil Procedure Rules** for the following orders:-

*1. There be a stay of execution of the decree herein pending the hearing and determination of this application inter-partes.*

*2. The proceedings of this court of 26/6/2013, 21/01/2014, 14/05/2014,15/05/2014,12/08/2014 and all consequential orders be set aside.*

*3. That the Plaintiff's Advocates be compelled to immediately return into this court the sum of Kshs. 1 million which was withdrawn by them from this court pursuant to the exparte order made on by the Deputy Registrar on 15/05/2014.*

*4. The costs of this application be provided for.*

2. The application is based on the following grounds:-

*a. That the firm of Onsando Ogonji & Tiego Advocates took over the conduct of this case from the firm of Okong'o Mogeni & Co.Advocates with effect from 07/05/2012.*

*b. The Plaintiff's Advocates in total disregard of the change so effected and to their knowledge continued to deal with the Defendant's former Advocates to their detriment resulting into the subsequent ex-parte proceedings of this court of 26/6/2013, 21/01/2014, 14/05/2014, 15/05/2014 and 12/08/2014.*

*c. The Plaintiff's Advocates fraudulently concealed the fact of change from the purview of the*

*court and misled it to make ex-parte orders to the detriment of the Applicants/ Defendants.*

*d. The Plaintiffs Advocates sneaked to court and procured the release of Kshs. 1 million so deposited to themselves without notice to the Applicants' Advocates.*

*e. The Plaintiff's Advocates have not served the Advocates with any application whatsoever and have caused a process server to file a false Affidavit of service.*

*f. The auctioneer have already proclaimed the Applicants' property.*

*g. It is only just, mete and right that the ex-parte proceedings be set aside for the ends of justice to be seen to have been served.*

3. Its further supported by a long supporting affidavit by one Marion Gitau an advocate in the firm of Onsando Ogonji & Tiego advocates. In the affidavit she has given a full chronology of the happenings in this file since the firm's take over.

4. The Plaintiff/Respondent has filed a Replying Affidavit in opposing the application. In it she has explained the history behind the application dated 4th November 2012. She accuses the Applicants of inordinate delay in setting down their application dated 4th November 2012 for hearing, and seeking the same orders in the application dated 4th November 2014. She further averred that the Applicants have not explained their reason for delay and failure to attend court for hearing.

5. When the application dated 4th November 2014 came for hearing Mr. Onsando for the Applicants referred the court to the Orders issued by Wendoh, J on 14th May 2012 in respect of the application dated 23rd April 2012.

6. The gist of his submissions is that pursuant to the Orders issued by Wendoh,J on 14th May 2012 no action should have been taken on this file before the orders were discharged. He is also complaining that even as all this was going on his firm was at no point served with a hearing notice. The Defendants/ Applicants were also not notified of the hearings before the court nor the Deputy Registrar.

7. It was his submission that the application dated 23rd April 2012 came up thrice for hearing but never proceeded. Further the parties were working on an out of court settlement hence the delay.

8. M/s Mitey in her submissions stated that there was no order allowing the firm of Onsando to come on record. She blames the defendants for the delay in having the matter heard. She further submitted that they always served the defendants who did not come to court for hearings. She asked the court to dismiss the application by the Defendants.

9. I have considered the affidavits in support of and against the application. I have equally considered the submissions by both Counsels and all the material on record.

10. From the record the 1st Defendant did not enter appearance nor file defence. The record does not show whether interlocutory Judgment was entered but from the record of 22nd February 2007 Counsel for the Plaintiff informed the court that he had an ex-parte judgment against the 1st Defendant. Prior to and upto the time of judgment the firm of Okongo Omogeni were appearing for the 2nd and 3rd defendants. They had also filed a defence.

11. The Plaintiff's case was heard by two different Judges. The Judgment giving rise to these numerous applications was entered ex-parte.

12. An application dated 23/4/2012 was heard before Wendoh,J in Nakuru on 7/5/2012. One of the prayers was for M/s Onsando Ogonji & Tiego Advocates to come on record in place of Okong'o Omogeni & Co.Advocates. Counsel appearing Mr. Omollo mentioned that he had a letter from the firm of Okong'o Omogeni indicating that they had no objection to the firm of Onsando taking over the conduct of the

matter. I can see in the file a letter to that effect, its dated 4th May 2012 ref no. 00/GICL/1156/06. After this presentation the court recorded;

*“ The firm of Onsando Ogonji & Tiego Advocates now on record.”*

By making such an order it automatically meant leave had been granted.

13. The court went further and heard Mr. Omollo who was appearing and the Judge granted prayer 5 of the Notice of Motion on condition that Kshs. 1 million was to be deposited in court. The court would not have heard him w/o the firm being on record.

Prayer 5 of the said application read:

*“That there be a stay of further proceedings herein pending the hearing and determination of this application inter partes.”*

14. The application was fixed for inter-partes hearing on 24th May 2012 but the same was adjourned by consent to 24th July 2012. There is no record showing what transpired on 24th July 2012.

From my reading of the Order by Wendoh, J stay had been granted though exparte. It was to last upto the time the application was heard and determined as long as the deposit was made, and the order was not set aside It was therefore unprocedural for the Deputy Registrar to proceed to tax the bill when those orders were in place.

Secondly, the affidavit of service filed on 26th June 2013 shows that it is the firm of Okong'o Omogeni & Co.Advocates who were served and not Onsando Ogonji & Tiego & Co.Advocates, who were now on record for the Defendants/Applicants.

My finding is that the defendants were not served with the Bill of Costs and the hearing notice thereof.

16. An application dated 3rd April 2014 was thereafter filed by the Plaintiff for dismissal of the Defendants application dated 23rd April 2012. For this application the Plaintiff decided to serve Onsando Ogonji. If indeed according to the Plaintiff the firm of Onsando & Ogonji was not on record for Defendants why did she serve them? At paragraph 3 of the affidavit of service Mr. Hezron Getuma Onsongo the process server states;

*“That the said clerk accepted service but retained all the copies of the Hearing Notice.”*

17. I am sure Hezron G. Onsongo knows why copies of a Hearing Notice and not a copy of a hearing notice is served. For a clerk to retain all the copies without giving him a copy it means besides his word there was no evidence of service on the said firm. He has not given the name of the clerk. This was misconduct by the said clerk and one would have expected Hezron G. Onsongo to report the matter to an advocate in the said firm. For him to have taken no action shows he was not truthful or he did not take his work seriously. I would therefore not be so confident as to say the defendants were well aware of the hearing date of 14th May 2014, as the affidavit of service is questionable. The matter was therefore heard exparte and its not correct for the Plaintiff's counsel to submit that the only way to challenge it would be by way of an appeal.

18. After Sergon,J granted orders dismissing the application dated 23rd April 2012, on 14th May 2014 Counsel for the Plaintiff appeared before the Deputy Registrar on 15th May 2014 to seek release of the Kshs. 1 Million deposited. The money was deposited with the court by the Order of the court. Why was the release of the same not sought before the Hon. Judge on 14th May 2014? It is true that after the dismissal of the application, the orders of stay of execution were no longer operational but I think it was important that the defendants be notified of the desire by the Plaintiff to have the money deposited released to her.

19. On 24th July 2014 Notices to show cause were taken out and fixed for hearing on 12th August, 2014. A copy of the Notice to show cause inside the file is addressed to the 1st defendant **only**.

However, in the affidavit of service Hezron G. Onsongo the Process Server shows he only served the 2nd Defendant. When the matter came before the Deputy Registrar on 12th August, 2014 it indicated that the Notice was served and execution was ordered. From this record it is clear that the 1st and 3rd Defendants were never served with the Notice to show cause. And further the Counsel for the 2nd and 3rd defendants was also not served/notified. A perusal of the warrants of attachment shows the person being pursued is the 1st defendant yet he is not the one who was served with the Notice to show cause.

20. I do agree that this is a matter that has been in the court for too long, but that is not reason enough for the due process to be overlooked. This has led to the several orders which have been issued herein. The omissions and commissions must be corrected. The Deputy Registrar is also asked to be keen on what is presented to him/her before issuing any orders.

21. The upshot is that the application dated 4th November 2014 is allowed, in terms of prayer no.3. The application dated 23rd April 2012 is reinstated and both Counsels are directed to fix the said application for hearing within 30 days.

22. Prayer No.4 is disallowed. The Plaintiff has acknowledged having been given the money by her advocates. This court has also taken note of that acknowledgment by the Plaintiff.

Since the court had a role to play in what has happened herein I will order each party to bear his or her own costs

**Dated, signed and delivered in open court this 22nd day of January, 2015**

**H.I.ONG'UDI**

**JUDGE**

**In the presence of**

M/s Onsando for Defendants/Applicants-absent

M/s Maritim for Plaintiff/Respondent – present

Rotich- court assistant